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INDIGENOUS ISSUES

Human rights and indigenous issues

Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57

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Executive summary

Pursuant to the resolution establishing his mandate, the Special Rapporteur has undertaken a number of activities, beginning with attendance at the annual session of the Working Group on Indigenous Populations (WGIP) in July 2001, where he met with government delegates, indigenous peoples, human rights organizations and staff of the Office of the United Nations High Commissioner for Human Rights (OHCHR). In September he attended the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in South Africa. Furthermore, in response to numerous invitations, he addressed a number of seminars on issues related to his mandate organized by, among others, the World Bank, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Institute for Training and Research (UNITAR) and the Commission on Human Security.

This first report to the Commission on Human Rights is not a narrative of the Special Rapporteur's activities since his appointment. Rather, he wishes to provide a panorama of the main human rights issues besetting indigenous people at the present time and to set out a framework and agenda for his activities in the future. The report consists of four parts: (a) an overview of activities carried out in the United Nations system in relation to the human rights of indigenous people; (b) the principal issues and problems of indigenous peoples at the present time; (c) a summary of the main content of numerous communications on the situation of indigenous people (the addendum contains a more detailed account of these indigenous claims); (d) an outline of the Special Rapporteur's future activities.

The United Nations system carries out numerous activities relating to indigenous peoples. Notable among them are the annual sessions of the Working Group on Indigenous Populations which since 1982 has examined the situation of indigenous populations and makes recommendations on the topic. Its principal achievement has been the preparation of the "Draft United Nations declaration on indigenous rights", currently being considered by the Commission on Human Rights. A similar declaration is being prepared in the regional system of the Americas. However, the only legally binding instrument on indigenous rights so far is International Labour Organization Convention No. 169, ratified to date by 14 States. Within the framework of the International Decade for the World's Indigenous Peoples (1995-2004), the specialized agencies have developed guidelines concerning their activities with indigenous people, and the World Bank is overhauling its own policies in this field.

There has been much legislative activity concerning indigenous peoples at the national level, mainly in Latin America, but also in South-East Asia and Africa. Peace agreements involving States and indigenous peoples were signed in recent years in Guatemala, Mali and Mexico, but their implementation is still problematic.

The major issues involving indigenous rights relate to land, territory, the environment and natural resources; the administration of justice and legal conflicts; poverty, standards of living and sustainable development; language, culture and education; self-government, autonomy, political participation and the right to self-determination. Across-the-board

discrimination and marginalization, particularly involving women and children, is a persistent problem. Indigenous peoples are especially vulnerable in situations of civil conflict and violence. Some cases are referred to in this report, others are further documented in the addendum.

While debates continue over questions of a definition of indigenous people, the Special Rapporteur notes that the right of indigenous persons and peoples to self-definition is the most accepted form of identification consistent with a human rights approach.

During the first few months of his mandate the Special Rapporteur has begun to receive information from various sources regarding the alleged violation of human rights of indigenous communities and peoples. While numerous allegations involve the rights of indigenous individuals, the general pattern refers to indigenous collectivities, whether local communities, tribes, or specific peoples. The rights invoked in these complaints and communications relate to the issues mentioned in the preceding paragraphs. The report provides a synthetic survey of a sample of cases, which are documented in more detail in the addendum. The Special Rapporteur is still not clear as to the most efficient way of processing such communications, the number of which is expected to increase, and he would appreciate guidance from the Commission on this issue.

The last section of the report sets out a provisional programme of the Special Rapporteur's future activities. It includes a list of seven major topics that, in his judgement, deserve special scrutiny and analysis, and suggests some methods for obtaining and handling information, including the use of questionnaires and schedules, and in situ visits.

In his oral presentation of the report to the Commission, the Special Rapporteur expects to expand on some of the topics, which, due to limitations of space, are not adequately covered in this document.

Introduction

"The persistent plight of the indigenous people in many parts of the world is an affront to our common humanity."

Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A Global Quest for Justice*, 1987

1. On 24 April 2001, at its fifty-seventh session, the Commission on Human Rights adopted resolution 2001/57 in which it decided to appoint, for a period of three years, a special rapporteur on the situation of human rights and fundamental freedoms of indigenous people with the following functions: (a) to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms; (b) to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people; (c) to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights.

2. Pursuant to the resolution, the Special Rapporteur has undertaken a number of activities, beginning with an initial dialogue with indigenous organizations, government delegates, non-governmental organizations, individual experts, members of the Secretariat, and United Nations bodies and specialized agencies, including the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO) and the World Bank, while he was attending the Working Group on Indigenous Populations in July 2001. This helped him to identify some crucial concerns that indigenous peoples are currently facing with regard to their human rights.

3. The Special Rapporteur attended the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance from 31 August to 7 September 2001, in Durban, South Africa. Furthermore, in response to numerous invitations, he addressed a number of seminars and workshops on issues related to his mandate, such as a regional consultation on the World Bank's operational policies on indigenous peoples, a regional seminar on education and human rights organized by UNESCO, another one organized by UNITAR on capacity-building for conflict resolution and reconciliation involving indigenous peoples, as well as a seminar of the Commission on Human Security, and an evaluation of the impact of ILO Convention No. 169 at its tenth anniversary (November/December 2001).

4. The Special Rapporteur takes this opportunity to express his appreciation to the Governments, institutions, organizations and individuals who have replied to his early request for information and collaboration, as well as to the devoted staff of OHCHR who have provided technical support and advice. He looks forward to receiving more information from these sources, and hereby asks all Governments and interested parties for their full and prompt cooperation.

5. This first report to the Commission is not a narrative of the Special Rapporteur's activities during the six months which have elapsed since his appointment. Rather, he wishes to provide a panorama of the main human rights issues besetting indigenous people at the present time, give consideration to appropriate ways of dealing with human rights concerns brought to his attention by ensuring that there is no "protection gap" in processing human rights complaints, and to set out a framework and agenda for his activities in the future. The report consists of four parts. Section I provides a partial overview of activities carried out in the United Nations system in relation to the human rights of indigenous people. Section II deals with the principal issues and problems that indigenous peoples are facing, which have come up repeatedly in their presentations to the United Nations and elsewhere. Section III presents a sample, in summarized form, of the main content of numerous communications to the Special Rapporteur. Finally, in the last section, an outline of the Special Rapporteur's future activities is proposed. The Special Rapporteur hopes to be able to elaborate on some of the points not satisfactorily covered in this report on the occasion of his oral presentation to the Commission on Human Rights.

I. BACKGROUND

6. The formal activities of the United Nations concerning indigenous issues began in 1970 with the recommendation by the Sub-Commission on Prevention of Discrimination and Protection of Minorities that a comprehensive study of the problem of discrimination against indigenous populations be undertaken, followed by the appointment of a special rapporteur to carry out the study. This was followed by the establishment of the Working Group on Indigenous Populations (WGIP), which was to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations and give special attention to the evolution of standards concerning the rights of such populations. It held its first annual session in 1982.

7. The WGIP has been meeting annually since 1982 to consider developments in the situation of indigenous populations and recommend standards for the protection and promotion of their human rights. Over the years the Working Group has provided an open forum for indigenous participation and devoted its discussions to numerous topics concerning the human rights of indigenous peoples, such as the land issue, the right to development, cultural heritage and intellectual property, health and education. Its annual reports to the Sub-Commission comprise a wealth of information on the human rights situation of indigenous peoples and the accumulated communications and interventions of indigenous associations and other non-governmental organization (NGOs) provide a rich overview of current concerns. In obtaining information for his activities, the Special Rapporteur expects to draw extensively on this material. Special acknowledgement must be accorded to the work of Ms. Erica-Irene Daes, the chairperson of the WGIP for almost 20 years, under whose guidance the WGIP produced the "Draft United Nations declaration on indigenous rights", which is currently being considered by the Commission.

8. The proclamation of the International Year for the World's Indigenous Peoples (General Assembly resolution 45/164), followed by the proclamation of the International Decade (Assembly resolution 48/163) expressed the growing interest of the international community in the fate of indigenous peoples and reflected the fact that the "indigenous" question has become a key issue on the international human rights agenda.

9. Further signs of continuing interest by the United Nations in the problematic of indigenous peoples are the establishment by the Economic and Social Council of the Permanent Forum on Indigenous Issues (to meet for the first time in May 2002), and the appointment by the Commission of a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2001). OHCHR and other United Nations bodies have also organized numerous consultations, workshops and other events concerning this topic. In 1993, the General Assembly requested United Nations financial institutions, operational programmes and specialized agencies, to give increased priority and resources to improving the conditions of indigenous people. The Special Rapporteur will maintain close relations with these bodies to ensure complementarity in the United Nations work on this mandate.

10. This introduction will briefly review the principal texts concerning indigenous peoples that have been produced by the United Nations system and other multilateral institutions, mainly in order to sketch out various international human rights standards that specifically address the rights of indigenous peoples, which are, in turn, the basis for the Special Rapporteur's mandate.

A. Legally binding instruments concerning indigenous peoples

1. ILO Convention No. 169 (1989)

11. The International Labour Organization showed an early interest in the situation of indigenous peoples. In 1957 the ILO adopted Convention No. 107 on indigenous and tribal populations in independent countries. Some 30 years later, recognizing that the international environment for indigenous peoples had changed, the ILO proceeded to review Convention No. 107 and in 1989 the General Conference adopted the Indigenous and Tribal Peoples Convention, better known as "Convention 169", which entered into force in 1991. Convention 169 has now been ratified by 14 countries: Argentina, Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay and Peru.[1]

12. Convention 169 deals, among other aspects, with the right to possession of land and territories traditionally occupied by indigenous peoples, the recognition of their cultural, social and religious values, custom-based law, the right to health services, and the right to benefit from equal conditions of employment. Complaint procedures are handled by the ILO Committee of Experts on the Application of Conventions and Recommendations and a tripartite committee, to which indigenous individuals and organizations have indirect access through the ILO tripartite structure. Two interrelated themes have arisen repeatedly, both in the comments of the Committee of Experts and in the reports of tripartite committees established to examine representations brought against States under article 24 of the ILO Constitution. These are the duty of States to consult with indigenous and tribal peoples when consideration is being given to legislative or administrative measures that affect them, and the same duty of consultation prior to the exploration or exploitation of natural resources on the lands they occupy or use. In its report submitted to the International Labour Conference in 1999, the ILO Committee of Experts observed that Convention No. 169 was the most comprehensive instrument of international law for the protection in law and in practice of the right of indigenous and tribal peoples to preserve their own laws and customs within the national societies in which they lived.[2] The Convention

remains, and is likely to remain for some time to come, the only international legal instrument currently in force and open for ratification that addresses specifically the rights of indigenous and tribal peoples. Since its adoption in 1989, it has had considerable influence at the national, regional and international levels.

2. Agenda 21, chapter 26 (1992)

13. The United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, adopted Agenda 21, of which chapter 26 grants a central position to indigenous populations as important players who must be included in the environmental agenda. Chapter 26 recommends that indigenous lands need to be protected from environmentally unsound practices and from activities the people consider to be socially and culturally inappropriate. Indigenous people may require greater control over their lands and self-management of their resources. States should also adopt laws and policies to preserve customary practices and protect indigenous property, including ideas and knowledge. Indigenous peoples should be allowed to participate actively in shaping national laws and policies on the management of resources or other development processes that affect them. Since then, a number of legal instruments relevant to indigenous peoples have been elaborated such as the United Nations Framework Convention on Climate Change, the Convention to Combat Desertification, and the establishment of the United Nations Forum on Forests.

3. Convention on Biological Diversity (1992)

14. The Convention on Biological Diversity, adopted in Nairobi in 1992, has been signed by 141 countries. Article 8 (j) addresses the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. The article embodies the recognition of the contribution that traditional knowledge can make to both the conservation and the sustainable use of biodiversity.

B. Draft declarations

1. The Draft United Nations declaration

15. The "Draft United Nations declaration on the rights of indigenous peoples", prepared by the Working Group on Indigenous Populations with the active participation over the years of numerous indigenous organizations from around the world, and currently under review by the Commission,[3] is undoubtedly the most important human rights document for indigenous peoples, and it should be adopted before the end of the International Decade. Though similar in many respects to Convention 169, there are certain differences. Considering that the rights of indigenous peoples constitute an evolving area in the field of human rights in general, and an important step in the consolidation of the International Bill of Human Rights, then surely the draft declaration must build upon and go beyond the achievement represented by Convention 169 and certainly not lower the human rights standards that have already been set in this Convention.

16. It is important to note that while Convention 169 has received only a limited number of ratifications up to now, it is rapidly becoming a vibrant instrument for use by both States and indigenous organizations. The complaints procedure in the ILO has provided access for indigenous human rights concern, and is being increasingly used by the interested parties. Likewise, although still a draft, the draft declaration is being invoked more and more by indigenous organizations in their struggles for human rights and their negotiations with States and other agents. Both the Convention and the draft declaration have become widely respected moral human rights standards, another reason why the declaration must not be allowed to disappoint the great expectations it has generated.

2. Draft American declaration on the rights of indigenous peoples

17. In the Americas, ever since the first Inter-American Indianist Congress of 1940, there has been regional concern with what was then termed the "indigenous problem". In the early 1990s, the Organization of American States (OAS) asked the Inter-American Commission on Human Rights (IACHR) to prepare a draft declaration on the rights of indigenous peoples, which is currently being considered by the OAS and is expected to be adopted formally before the end of the International Decade. The Inter-American draft declaration is quite similar in scope to the United Nations declaration, but differs in some essential points; its adoption is also facing some of the same difficulties.

18. The IACHR has concerned itself over the years with indigenous issues, by issuing special resolutions and recommendations to States, and preparing reports on the situation of the human rights of indigenous peoples in specific countries of the region. More recently, it has brought suit, in defence of indigenous communities, before the Inter-American Court of Human Rights (see below).

C. Other international declarations

1. Vienna Declaration and Programme of Action (1993)

19. The World Conference on Human Rights in 1993 adopted the Vienna Declaration and Programme of Action. Paragraph 20 of Part I of the document, dedicated to indigenous peoples, stresses issues such as participation and the unique contribution of indigenous people to the development and plurality of society, and recommends: "... States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization."

2. Durban Declaration and Programme of Action (2001)

20. Held in Durban, South Africa, in September 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) dealt with indigenous rights within the framework of racism and racial discrimination. The Declaration and Programme of Action refer extensively to indigenous peoples, reaffirming their rights. This may be seen as a positive result. The framers of the Durban Declaration "recognize that the

indigenous peoples have been victims of discrimination for centuries and affirm that they are free and equal in dignity and rights and should not suffer any discrimination, particularly on the basis of their indigenous origin and identity, and ... stress the continuing need for action to overcome the persistent racism, racial discrimination, xenophobia and related intolerance that affect them" (para. 39). They also "emphasize that, in order for indigenous peoples freely to express their own identity and exercise their rights, they should be free from all forms of discrimination, which necessarily entails respect for their human rights and fundamental freedoms" (para. 42).

21. However, even though a number of paragraphs in the Durban Declaration specifically refer to indigenous peoples, the text has been harshly criticized by indigenous representatives who claim that it is discriminatory. To the extent that the use of the term "indigenous peoples" in the Declaration "... is in the context of, and without prejudice to the outcome of, ongoing international negotiations on texts that specifically deal with this issue ..." (para. 24), indigenous representatives expressed their dismay at what they felt to be a denial of their human right to be considered as "peoples" equal to other peoples in the world. Another problematic formulation is paragraph 43, which deals with land rights (see below). Indigenous representatives feel that the Durban Declaration and Programme of Action fall short of expectations on indigenous rights and could actually be considered a step backwards as far as human rights standards are concerned.

D. Declarations and guidelines of various international bodies

1. United Nations treaty bodies

22. The Special Rapporteur notes the emerging jurisprudence of the treaty bodies, in particular the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination, all of which have made specific recommendations relevant to indigenous peoples.

2. UNESCO

23. During the 1990s, UNESCO organized a number of international seminars and adopted resolutions and recommendations regarding rights and policies involving indigenous peoples within the organization's areas of competence, that is, principally education, culture, science and communications, with emphasis on the fields of bilingual education, language rights, indigenous knowledge and the use of the media to protect and stimulate indigenous cultures. UNESCO has been instrumental in developing a number of legal instruments, notably the Universal Declaration on Cultural Diversity adopted in November 2001. Article 4 of the Declaration specifically underscores that the conservation of cultural diversity will be a fundamental ethical precondition to the promotion of human rights and fundamental freedoms, particularly those of minorities and indigenous peoples.

3. World Health Organization

24. WHO has become involved in issues dealing specifically with the health of indigenous people. In 1999, the International Consultation on the Health of Indigenous Peoples adopted the Geneva Declaration on the Health and Survival of Indigenous Peoples, acknowledging that the

health and well-being of indigenous peoples is overwhelmingly affected by factors outside the realm of health itself, namely social, economic, environmental and cultural determinants. In the field of indigenous health, the Pan-American Health Organization (PAHO) has also become active over the years.

4. UNDP

25. In 1995, UNDP issued draft guidelines for support to indigenous peoples, in which four fields of action are identified: cultural revitalization, improvement of living standards, preservation of natural resources, and economic and technological development. Many UNDP small grants to regional and national programmes have involved indigenous communities. The UNDP "Policy of Engagement", adopted in 2001, underlines the main principles guiding the relationship with indigenous peoples and identifies five areas of support to indigenous peoples: participation, self-determination, conflict prevention and peace building, environment and sustainable development, and the effects of globalization.

5. World Intellectual Property Organization

26. WIPO is devoting some of its activities to the intellectual property of indigenous peoples (i.e. their cultural heritage), which includes the information, practices, beliefs and philosophy that are unique to each indigenous culture. It has organized seminars, workshops, fact-finding missions and studies, together with indigenous organizations, on issues related to the impact of corporate business interests on indigenous knowledge and heritage, and is developing guidelines for the protection of indigenous intellectual property rights. Currently, intergovernmental discussions are being held on how indigenous peoples' rights to traditional knowledge, folklore and genetic resources can be protected in national legislation. The second session of the commission established to deal with these matters was held in Geneva from 10 to 14 December 2001.

6. International financial institutions

27. The World Bank developed its interest in the situation of indigenous peoples as a result of the lobbying activities of indigenous, human rights and environmental organizations, which were concerned with the impact of World Bank-financed projects on the well-being, lifestyles and survival of indigenous peoples. The Bank's operating guidelines with respect to indigenous peoples, contained in Operational Directive 4.20 (1991), provides guidance to officials and staff of the Bank in implementing its policies on indigenous populations. The aim of the policy is "to ensure that the development process fosters full respect for [indigenous peoples'] dignity, human rights and cultural uniqueness, [and] to ensure that indigenous people do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits". The Bank is currently revising OD 4.20, in consultation with indigenous organizations, aiming to convert it into a mandatory Operational Policy for all of its development projects related to indigenous peoples.

28. Along similar lines, the Inter-American Development Bank (IDB) is concerned about the development of indigenous peoples in the Americas. It supports development projects in indigenous areas and provides technical and financial cooperation to the Fund for the

Development of Indigenous Peoples of Latin America and the Caribbean, which was established by the Ibero-American Summit Conference in 1992. In 1994 the IDB directors identified indigenous peoples as one of the groups targeted for assistance by the Bank.

29. In 1998, the Asian Development Bank approved its Policy on Indigenous Peoples. Recognizing the real and potential vulnerability of indigenous peoples in development processes, the policy requires that the Bank's interventions in development support or assistance not affect indigenous peoples' situation negatively, and that adequate and appropriate compensation be provided if necessary.

E. Legislation and reforms at the national level

30. Many States have adopted legislation concerning indigenous peoples; such is the case in North America, Australia and New Zealand. The Indians and Inuit of Canada, the Aborigines of Australia and the Maoris of New Zealand are considered "first nations" or aboriginal peoples who have rights that are recognized in international law.[4] These peoples, who lost their land to colonizers according to the now discredited doctrine of *terra nullius*, are reclaiming their territories based on the principle of aboriginal title. The concept has now developed in international law to protect rights of indigenous peoples.[5]

31. In Latin America, where for a long time indigenous peoples were not recognized as distinct segments of the population, the 1980s and 1990s witnessed a spate of constitutional reforms and special legislation concerning the rights of indigenous peoples, notably in Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay and Venezuela. These legal reforms cover numerous issues such as land and territorial rights, customary law, language, educational and cultural rights, as well as autonomy and self-government in some cases. They generally direct Governments to give special attention to policies designed to further the development of indigenous communities.[6] Yet even within this new legal framework, numerous alleged violations of the human rights of indigenous peoples are frequently reported. Among South-East Asian States, only the Philippines, Malaysia and, most recently, Cambodia have specific laws concerning indigenous peoples.

32. In the Scandinavian countries the Sami people are legally recognized as culturally distinct, with special rights. In Sweden, for example, a law adopted in 2000 grants the right of individuals to use the Sami language in dealings with the administration and the courts. Sweden and Finland are still considering whether to ratify Convention 169, as there are ambiguities regarding indigenous land rights in the national legislation of these countries. Sweden considers the Sami within the framework of its approach to national minorities, but in Norway the Sami are recognized as an indigenous people.[7] A Sami parliament is empowered to negotiate issues of common concern with the Governments involved. At a different level, the autonomous status of Greenland in relation to Denmark is an example of a constructive relationship between an indigenous people and a former colonial power. The "Small Peoples of the North" in the Russian Federation are covered by the recent adoption of the Federal Law on Guarantees of the Rights of Small Indigenous Peoples of the Russian Federation in 1999, which is the first real step towards the recognition of indigenous peoples in Russia. The law provides for judicial protection of the rights of small indigenous peoples (art. 14) and establishes protection for the

indigenous environment, traditional lifestyle and economy, alternative military service, and protection of traditional cultures and languages. A recent law of April 2001 refers to the territories under traditional nature management by indigenous peoples.

33. Only a handful of African States actually recognize the existence of indigenous peoples on their territory. Ethiopia's Constitution speaks of the unconditional right to self-determination of every nation, nationality and people in Ethiopia. The Constitution of Cameroon protects the rights of minorities and upholds the rights of indigenous people. The 1996 Constitution of Uganda protects the rights of marginalized groups and is committed to affirmative action policies in their favour. The 1996 Constitution of Algeria recognizes the Amazigh dimension of Algerian culture and Namibia's Constitution recognizes the Nama language. The democratic Government of South Africa gives recognition to the rights of the San, generally acknowledged as the aboriginal southern Africans. The Constitution promotes the protection of the Khoi, Nama and San languages. Despite a changing legal environment, however, human rights violations of indigenous peoples continue to be reported (see annex I).

II. MAJOR HUMAN RIGHTS ISSUES CONFRONTING INDIGENOUS PEOPLES

34. In 1953 the International Labour Office published a remarkable study on the living and working conditions of aboriginal populations in independent countries in which it found that: "As a rule the living standard of the aboriginal populations in independent countries is extremely low, and in the great majority of cases is considerably lower than that of the most needy layers of the non-indigenous population."[8] Three decades later, José Martínez Cobo, the Special Rapporteur of the Sub-Commission on the problem of discrimination against indigenous populations, observed that in "many countries they were at the bottom of the socio-economic scale."[9]

35. More recently, the World Bank carried out a comparative empirical study on indigenous peoples and poverty in Latin America which finds that "poverty among Latin America's indigenous population is pervasive and severe [and] the living conditions of the indigenous population are generally abysmal, especially when compared to those of the non-indigenous population".[10]

36. These findings are consistent with those of numerous other studies on the situation of indigenous peoples the world over; they tend to show not only that the living conditions of the indigenous people are generally deplorable, but also that this situation is closely related to the discrimination and other human rights abuses of which indigenous peoples are the victims. Despite efforts to improve their conditions, indigenous peoples are still handicapped by low standards of living and face numerous obstacles in their attempts to overcome their situation.

37. While some progress has been achieved over the last two decades, particularly as regards international and national legislation relating to the human rights of indigenous peoples (see Introduction), their overall situation is still a matter of great concern. If we look at different indicators of achievement of social, economic and cultural rights, indigenous people consistently score lower than the rest of the population.

38. Comparative research and a careful scrutiny of statements and communications presented by indigenous and human rights organizations as well as reports produced by Governments, international organizations and independent sources allow us to group the major issues currently facing indigenous peoples into a number of categories, namely, land rights, homelands and territories, education and culture, social organization and customary legal systems, poverty, standards of living and sustainable development, and political representation, autonomy and self-determination.

A. Land rights

39. We shall refer in the first place to issues regarding land rights, which constitute a major problem for indigenous communities and have been studied extensively over the years. From time immemorial indigenous peoples have maintained a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as identifiable territorial communities. The right to own, occupy and use land is inherent in the self-conception of indigenous peoples and generally it is in the local community, the tribe, the indigenous nation or group that this right is vested. For economically productive purposes this land may be divided into plots and used individually or on a family basis, yet much of it is regularly restricted for community use only (forests, pastures, fisheries, etc.), and the social and moral ownership belongs to the community.

40. This has often been recognized in the national legal system, but just as often certain kinds of economic interests have attempted - and frequently succeeded - in turning communal possession into individual private ownership, a process which began during the colonial period in many countries and intensified during post-colonial times. In Mexico, for example, the break-up of indigenous agrarian communities in the nineteenth century was one of the reasons for the Mexican revolution of 1910. The Mapuche communities in southern Chile were obliged to accept the disintegration of their communal territories during the military dictatorship in the 1970s.

41. Mr. Martinez Cobo reported that in some countries legal provisions existed for the protection of indigenous lands, but he also noted in the early 1980s that "efforts are now being made to abolish them and to accord to the indigenous peoples individualized and unrestricted private ownership of land ...".[11] Moreover, in numerous countries indigenous peoples have been dispossessed of their land and large outside private or corporate economic interests have been able, with or without State support, to appropriate land belonging to indigenous communities. Not much has changed since then. While legal protective measures have been enacted with greater frequency, the loss and dispossession of indigenous lands has proceeded relentlessly, in some countries more rapidly than in others, and the consequences of this process have in general been quite deplorable on the human rights situation of indigenous peoples.

42. Erica-Irene Daes notes in her study on indigenous peoples and the land that "it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies".[12] In some countries, the concept of aboriginal title is crucial to the human rights of indigenous peoples. This is the case in parts of the British Commonwealth, where exclusive use and occupancy of land from time immemorial

gave rise to aboriginal title. Where this title is recognized, indigenous peoples have at least some justiciable right that can be asserted in the domestic legal system.[13] Other countries have decided to demarcate indigenous lands, but as Ms. Daes points out, in terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. Ms. Daes concludes: "Indigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources ... The failure of States to implement or enforce existing laws for the protection of indigenous lands and resources is also a widespread problem."[14]

43. In Latin America the issue of indigenous land rights and human rights related to agrarian problems is particularly acute. A report prepared for the Economic Commission for Latin America and the Caribbean (ECLAC) finds that land reforms during the twentieth century "... did benefit indigenous people, allowing them to recover a part of the land which they claimed, but the programs did not recognize their ethnic and cultural specificity so that the indigenous populations were considered simply as farmers ... The convenience of introducing legal reforms that would grant the indigenous a greater degree of autonomy and/or participation in the management of economic, social, political and cultural processes on their lands and/or territories ... is a central demand of the indigenous peoples and their organizations at the current time ... and it should not be ignored by States."[15]

44. Land rights issues also affect indigenous communities in other parts of the world. A case in point is that of the Orang Asli in Malaysia, where, as one specialist reports, "... the greatest threat today to Orang Asli culture and identity is their dispossession from their traditional homelands".[16] In Cambodia, a major development constitutes the recent land law, passed in August 2001, article 26 of which states that ownership of land "is granted by the State to the indigenous communities as collective ownership. This collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners". The land law also provides for demarcation of indigenous lands "according to the factual situation as asserted by the communities in accordance with their neighbours". (See the addendum.)

45. Indigenous communities and human rights organizations are working together to protect the lands to which they have a claim according to international and national legal standards. A landmark case in this direction is the decision of the Inter-American Court of Human Rights in favour of the Awas Tingni indigenous community in Nicaragua. After a lengthy process, the Court decided in August 2001 that the State had violated the right to judicial protection and the right to property as contained in the American Convention on Human Rights of the members of the Awas Tingni community, and also decided that: "the State must adopt within its domestic legal system, in conformity with article 2 of the American Human Rights Convention, measures of a legislative, administrative and whatever other character necessary to create an effective mechanism for official delimitation, demarcation and titling of the indigenous communities' properties, in accordance with the customary law, values, usage and customs of these communities" and that "the State shall officially recognize, demarcate, and issue title for those lands belonging to the members of the Mayagna (Sumo) Community of Awas Tingni and cease, until this official delimitation, demarcation, and titling is effectuated, acts which could cause agents of the State, or third parties acting with its acquiescence or tolerance, to affect the

existence, value, use or enjoyment of that property located in the geographic area in which members of the Mayagna (Sumo) Community of Awas Tingni live and carry out their activities".[17]

46. Similar judgements are known to have been made by the courts in other States as well, so that indigenous land rights can, and indeed are, in some cases protected by favourable legal and court action. Still, these are exceptional cases, because generally indigenous communities do not have easy access to the judicial system and in a number of countries these remedies are not available to the indigenous at all. It therefore appears that in the future efforts must be made to improve access to the judicial system by indigenous communities and to reform the legal systems where indigenous peoples are denied access to legal recourse.

47. But even when laws are in principle available to the indigenous, these are not always implemented for their benefit. Numerous States report on recent legislative activity by which indigenous rights are seemingly protected, but indigenous organizations also report that their implementation leaves much to be desired. How to implement existing legislation effectively is as important for the rights of indigenous peoples as the adoption of such legislation itself. Moreover, not all legislation governing the ownership, use and access to land and other natural resources is favourable to the protection of indigenous rights. In some countries recent legislation undermines traditional communal or tribal holdings and opens the way to their dispossession by third parties or other private or corporate interests.

48. Erica-Irene Daes writes that "... aboriginal title is often subject to the illegitimate assumption of State power to extinguish such title, in contrast to the legal protection and rights that, in most countries, protect the land and property of non-indigenous citizens, other individuals and corporations ... This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples ...". Moreover, "The expropriation of indigenous lands and resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultation."[18] Violations of indigenous land rights within the framework of national development programmes are a major source of social tensions in a number of countries, and deserve closer scrutiny in the future.[19]

B. Homelands and territories

49. It is sometimes considered that the land issue is basically related to the availability of land for productive purposes (agriculture, forestry, herding, foraging) by individual members of indigenous communities. While this is certainly of the greatest importance because the lack of access to productive land sentences rural indigenous families to poverty and impels their members to emigrate in search of work, not always successfully, there are other factors involved as well.[20] Indigenous communities maintain historical and spiritual links with their homelands, geographical territories in which society and culture thrive and which therefore constitute the social space in which a culture can reproduce itself from generation to generation. Too often this necessary spiritual link between indigenous communities and their homelands is misunderstood by non-indigenous persons and is frequently ignored in existing land-related legislation.

50. The Human Rights Committee has examined this question and adopted the following general comment on article 27 of the International Covenant on Civil and Political Rights:

> "... one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority ... With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples ...".[21]

51. Some scholars argue that the recognition of indigenous territorial rights is necessary for the full protection of the human rights and fundamental freedoms of indigenous peoples, whereas others seem to fear that such recognition might undermine the unity and integrity of existing States. Nevertheless, in a number of States such rights have indeed been legislated and experience suggest that national unity is not threatened by these developments.

52. After a decades-long struggle for legal redress concerning ancient land rights and aboriginal title, the Inuit people of northern Canada, who had linked land claims to territorial autonomy, negotiated a political agreement with the Government whereby they achieved the creation, in 1999, of the self-governing territory of Nunavut. Rather than weaken national unity, this arrangement has strengthened the federal structure of Canada and met the claims and aspirations of the Inuit people.[22]

53. In Panama, seven indigenous peoples, the Ngöbe, the Kuna, the Emberá, the Wounaan, the Buglé, the Naso and the Bri Bri, who together represent 8.3 per cent of the national population, are mostly concentrated in five legally constituted territorial units (*comarcas*) which make up almost 20 per cent of the country's total land area. These *comarcas* are semi-autonomous regions governed by local councils and traditional governors (*caciques*).[23]

54. How can and should existing States coexist with the notion of indigenous territories? Are these notions incompatible? To what extent is the idea of legally recognized indigenous homelands a necessary ingredient for the full enjoyment of the range of human rights by indigenous peoples? These are still open and debated questions, and answers will vary according to region and country. While there are a number of practical experiences that illustrate the problems involved, more research is needed to address the particular issues, which are frequently controversial in public discourse. How can constructive arrangements be found to reconcile the legitimate concerns of States regarding territorial integrity and national unity, and the equally legitimate concerns of indigenous peoples regarding their collective survival qua peoples linked to the earth in myriad ways, within an international system made up of sovereign States? The Special Rapporteur intends to pursue these questions in the future, drawing on existing research and expertise, consulting relevant specialists and visiting particular areas where these issues are being dealt with.

55. The land rights issue cannot be separated from the issue of access to, and use of natural resources by indigenous communities. These rights are recognized in Convention 169 (art. 15) and in articles 28 and 30 of the draft declaration.[24] The draft American declaration on the rights of indigenous peoples has similar wording.[25]

56. Indigenous organizations have insistently demanded that attention be given to these rights, because access to the natural resources available in their habitat is essential for their economic and social development. Too frequently, such resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues (see Introduction) and some national legislation specifically protects the interests of indigenous communities in this respect, in numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades.

57. The Special Rapporteur considers, on the basis of the evidence and in agreement with Ms. Daes, that land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples, and proposes to pursue this issue further by looking more closely at the lessons that can be learned from a study of particular cases in different parts of the world.

C. Education and culture

58. The extensive literature produced over the last few decades on the situation of indigenous people around the world shows that they maintain, generally speaking, a cultural distinctiveness which distinguishes them clearly from other groups in society and from those sectors that are usually identified by the concept of "national culture". There are many features associated with this cultural distinctiveness, and in this report the Special Rapporteur wishes to underline only a few of those that have a direct bearing on the enjoyment of human rights and fundamental freedoms of indigenous people.

1. Language

59. Mention must be made in the first place of the importance of language in providing an essential cultural distinctiveness to any people. Language, as specialists have shown, is not only a medium of communication, but also a crucial element in the structuring of thought processes and in providing meaning to the natural and social environment of any person. A language community is also an epistemic community, that is, it links people through their participation in a common medium and in shared understandings. Indigenous language communities provide their members with the full range of cultural meanings attached to the use of a shared idiom. Most indigenous languages are very ancient and while they have undergone changes - just like any other language - they are transmitted from generation to generation and thereby help preserve the continuity of a language community and its culture.

60. Language rights are an essential element of the cultural rights that all persons enjoy under international human rights standards. The right to one's own language pertains not only to individuals but also to communities, nations and peoples. If a language community as such is

denied the collective and public use of its language (for example, in schools, the media, the courts, the administration) then any individual's right to this language is severely curtailed. Therefore, language rights are nowadays proclaimed as human rights, which entail respect, protection and promotion by others and especially by State authorities. Numerous States have now adopted legislation concerning the protection of regional, minority or indigenous languages. For example, in New Zealand, the 1989 Education Act has been amended to ensure funding for Maori pre-schools, primary schools, secondary schools and universities. The impetus for this came from Maori mothers insisting that the Maori reclaim the education of their children from birth through to adulthood.

61. From a historical perspective, however, State policies have not always recognized or protected the languages spoken by indigenous peoples or linguistic minorities. On the contrary, the intention of official linguistic, educational and cultural policies has often been the assimilation of such groups into the national mainstream, thus leading to language and culture loss. It has only been in recent years that these processes have been seen as being in violation of the human rights of the members of such linguistic communities, and they have sometimes been considered as a form of ethnocide.[26]

62. Nowadays, in some countries indigenous languages are recognized as national languages, at least in the regions in which they are widely used, and sometimes they have been accorded official status of some kind or another. In other cases, they may no longer be actually repressed but only tolerated as a private medium of communication and are not accorded any official status. In numerous indigenous linguistic communities around the world, it is common to find members of the older generation who maintain their language whereas the youth and children are more prone to suffer language loss, particularly when assimilationist policies are carried out. Article 30 of the Convention on the Rights of the Child is clear: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

63. The denial of the right to practice one's own culture, religion or language may take many forms. Often, when the social and institutional environment is unfavourable for the preservation and development of indigenous cultures and languages, this right is in fact denied even when there is no formal prohibition or restriction involved.

2. Education

64. The use of the mother tongue in education and public communications is an important issue in the definition of the human rights of indigenous peoples. In contrast to the formerly widely extended and dominant idea of formal schooling as an instrument of assimilation and acculturation, through which indigenous children learn to speak the national language and replace their own mother tongue, current thinking on the subject tends more towards the opposite direction. Bilingual and intercultural education has become educational policy for indigenous communities in many parts of the world. Specialists in education agree that early schooling in

both the native mother tongue and the official language of the State is of great benefit to indigenous children, who may become proficient in the vehicular (i.e. official) language of the wider society without losing their vernacular idiom.

65. Nevertheless, despite the best of intentions, the teaching of native tongues in schools has its difficulties. In the first place, many indigenous languages lack their own alphabets and do not have a written tradition. Secondly, the formal teaching of the vernacular tongue and of the vehicular idiom as a second language requires special training and pedagogical skills which indigenous teachers often lack. In Mexico, for example, where official bilingual education in indigenous areas has a history of many decades, the output level of students in bilingual schools is still below the national average. Furthermore, the preparation of textbooks and teaching materials in indigenous languages usually lags behind in areas where the national or official language is taught exclusively. In many countries school administrations (either public or private) are not set up to handle indigenous bilingual education effectively. To that extent, the indigenous right to education in their own languages is not being adequately implemented and requires serious attention in the future.

66. Even more problematic is the idea of multicultural or intercultural education, because this involves not only local schools but also the regional and national school systems and the educational philosophy of any country where there are indigenous peoples. The notion of multicultural and intercultural education leads to a complete revision of educational contents and methods in countries where it is applied. It basically means that the cultural diversity of the country is reflected in the curriculum and the preservation and promotion of cultural diversity become an objective compatible with democratic governance and the enjoyment of human rights by all. In some cases this approach will require the revision of traditional ideas held by majority or dominant cultural groups about national culture and identity. Indigenous peoples' organizations often need to remind the world that their own cultural specificities are also contributions to a universal culture and not mere relics of a disappearing past. The rights of indigenous peoples to culture and education (the whole gamut of cultural rights, in fact) include the right to the enjoyment and protection of their own cultures in a wider, multicultural world.

3. Multiculturalism

67. The preservation of indigenous cultures (including tangible and intangible elements, arts and artefacts, traditions, knowledge systems, intellectual property rights, ecosystem management, spirituality and so on) is an essential component of a comprehensive indigenous human rights package. This may seem self-evident to anybody who takes the cultural rights as set out in the International Bill of Human Rights for granted. But in fact the preservation of indigenous cultures is not a natural process at all. The reverse is more likely, because, as has been well documented in the specialized literature on the topic, public policies have frequently been designed to eliminate and transform indigenous cultures because their existence has often been considered as detrimental to the idea of national integration and development. Many countries adopted specific policies to "assimilate" indigenous peoples into the wider "national" culture within the framework of cultural and social modernization. While such ideas no longer command the support they used to have, and whereas more and more States adopt positions

favourable to multiculturalism, there are still numerous cases in which the cultures of indigenous peoples are under strong outside pressures to change, when they are not actually on the verge of extinction.

68. The idea of multiculturalism does not imply the artificial preservation of indigenous (or tribal) cultures in some sort of museum, but only the right of every human community to live by the standards and visions of its own culture. Certainly cultures change over time, but whether there will ever be one universal culture or any number of interrelated local, regional, ethnic and national cultures only time will tell. In human rights terms, it is clear that cultural rights pertain to every individual, yet these rights can only be fully enjoyed by all persons in community with other members of the group. Thus, indigenous peoples require guarantees that their cultures will receive the respect and consideration that other groups in society also enjoy, and that they will have the freedom to develop their cultural creativity in communion with other members of their group. At the international level, these issues have been taken up by UNESCO and WIPO with regard to the cultural heritage and intellectual property of indigenous peoples (see Introduction).

69. The cultural rights of indigenous peoples are also addressed in a number of national legislations, though not always with the clear intent of promoting and enhancing them. For example, in the Philippines, the Constitution includes several provisions concerning the rights of the "cultural communities", and article IV states that "the State shall recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions".

70. It was pointed out above that indigenous cultures are closely linked to the concept of land rights and the occupation and possession of territorial homelands. A question frequently asked of indigenous peoples is whether their cultural identities can survive in a de-territorialized environment, that is, in dispersed settlements and urban centres where indigenous migrants live interspersed with non-indigenous populations. The answer to this question depends on the particular circumstances and is contingent on the specific definition of indigenous identity in each case (see below). It may be argued that to the extent that cultural rights are universal, they are not subject to any kind of territorial restriction. The right of any individual or group of individuals to preserve, practise and develop their own culture is not dependent upon territoriality but rather related to self-identification. The Special Rapporteur intends in the future to address the problems of indigenous social and cultural rights in a non-local environment.

71. How the linguistic, educational and cultural rights of indigenous peoples are being protected - or not - under varying circumstances is an empirical question that needs more comparative research. UNESCO has recommended that States take special measures to ensure the protection and promotion of indigenous cultures. The African Commission on Human and Peoples' Rights has set out guidelines that require States to take specific measures aimed at the promotion of cultural identity and the "awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the populations".[27] The Commission has established a working group on the rights of indigenous populations and communities and is also encouraging indigenous peoples of Africa, among other things, to apply for observer status at the African Commission, to bring communications before it for consideration, to lobby the members of the Commission who come from areas where there are indigenous peoples, as well as to urge the appointment of a special rapporteur of the African

Commission on indigenous issues in Africa.[28] In this connection, the particularly sensitive situation of indigenous girls is of paramount importance, inasmuch as they are often the most vulnerable victims of discrimination, exclusion and marginalization. The literature on the subject is still incomplete and fragmentary; consequently, the Special Rapporteur intends to give this topic his particular attention in subsequent reports to the Commission.

4. Social organization, local government, customary law

72. Cultural identities are sustained not only by a discrete list of "elements" that every member of a cultural group "carries along" as he/she goes through life. In fact, these elements may vary from individual to individual and they may, and frequently do, change over time. So it is not the contents of a culture which defines any group's identity. It is rather in the field of social organization that identities are wrought and sustained. To the extent that a system of social relations defines the identity of each individual member and his/her link to the group as a whole, the social institutions and relationships characteristic of a given community are the necessary frame of reference needed for any culture to thrive. Indigenous communities know this well, because when they claim the right to maintain their social organization in the face of pressure from the wider society, they are actually appealing for the preservation of their culture.

73. Too often the larger society has taken the stance that indigenous social institutions are contrary to the national interest or, worse, are morally reprehensible. This position was taken for a long time by the dominant institutions in colonial empires. The question is frequently debated whether adherence to indigenous communal institutions may lead under certain circumstances to the violation of individual human rights (for example, the rights of women and girls).

74. Local community organization is often upheld by adherence to a generally accepted system of customs and mores, or customary law, which in numerous countries is not accorded any formal legal recognition and may in fact be considered as competing with the formal State legal system. Do community members who accept the norms of unwritten customary law stand in violation of a country's legal system? Does the application of customary law violate nationwide legal norms? Yet what about situations in which the application of positive law entails a violation of community norms and customs? Might that not constitute a violation of human rights as well?

75. These issues are dealt with in different ways by individual States (and by different scholars) and the various solutions run from some form of accepted legal pluralism to the absolute rejection by the official legal system of any kind of indigenous customary law, with a number of possibilities in between. Under what circumstances might the application of indigenous legal systems (customary law) threaten internationally accepted standards of individual human rights? And conversely, under what circumstances could the limitation or elimination of indigenous customary law violate the human rights of members of indigenous communities? These are complex issues, on which there is much debate and little agreement and which need to be addressed objectively and without bias, a task on which the Special Rapporteur intends to report to the Commission in the future.

76. Since time immemorial, local communities have evolved some form of local government within the structure of a wider polity into which they have been integrated as a result of historical

events. Indigenous communities are no exception. Throughout history, local communities have struggled to defend their autonomy against outside encroachment, sometimes successfully, sometimes not. To the extent that indigenous people were incorporated into State structures not of their own choosing during times of colonization or the expansion of the modern nation State, their local forms of government were modified or adapted to suit the interests and needs of the State, creating tensions that have often led to conflict and violence.

77. Indigenous organizations seek to preserve or regain the right to local (and sometimes regional) self-government; they consider this right as part of the fundamental freedoms which international law accords to all peoples. Through negotiations and treaties, constitutional reform or special legislation, indigenous peoples have been able in numerous instances to establish agreements with States regarding this right to self-government. In other cases, however, this has not been possible, and national- or regional-level government units still take it upon themselves to administer the affairs of indigenous communities. Indigenous affairs ministries, departments or bureaux often have specific mandates to that effect and local indigenous governments need to deal with these institutions rather than with those of the national political or administrative system in general. Indigenous organizations may consider this to be a form of discrimination, whereas Governments argue that such arrangements are designed for the protection of indigenous people themselves, in keeping with their best interests (as defined by the State).

78. Recognizing these issues, the Draft United Nations declaration on the rights of indigenous peoples states in article 33: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards."

79. How are the various arrangements concerning local self-government among indigenous peoples related to the exercise of their civil and political rights? How has recent legislation affected the protection and enjoyment of these rights? When indigenous self-government differs from constitutional municipal governing structures, how does this affect the human rights situation of indigenous communities? On this topic, as on others mentioned previously, the literature is fragmentary at best and the evidence is too limited to support any far-reaching conclusions. The Special Rapporteur proposes to approach this issue in a comparative framework from the standpoint of human rights and democratic governance, and expects to report back to the Commission in the future.

5. Poverty, standards of living, sustainable development

80. As already noted, indigenous people are very often found among the poorest strata in society, their standards of living are considered to be below average in many respects. Studies have shown high levels of infant mortality, lower than average nutritional levels, lack of public services, difficulty of access to social welfare institutions, lower than average delivery of the services provided by such institutions, inadequate housing and shelter, and generally low indicators associated with the idea of human development.

81. Many States have recognized these problems and promote special policies and measures designed to improve the standards of living of indigenous people. In other areas public policies are not oriented in this direction and the needs of indigenous populations have been neglected.

Numerous statements made by indigenous representatives at the WGIP over the years, and other information gathered by independent research bodies, confirm this tendency. For instance, the Committee on Indigenous Health of the Indigenous Peoples' Caucus expressed its concern at the nineteenth session of the WGIP that the gap between the health of indigenous peoples and the rest of society is widening, despite all efforts by national Governments and international agencies. It is also worried about the effects on indigenous peoples of the global health fund recently set up by the Group of Eight.[29]

82. What has been done and what can be done? For many decades national Governments, multilateral funding agencies, non-governmental organizations and private businesses have designed and implemented development projects at the local and regional levels in order to promote the economic and social development of indigenous communities. Whilst Convention 169 states in article 7, paragraph 1: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development", unfortunately, for multiple reasons, this does not always occur.

83. Recent experience has shown that economic growth must go hand in hand with social concerns if the results are to be effective and make a difference in the lives of individuals and communities. A new approach seems to be taking hold in international discourse: human rights-centred sustainable development, meaning that unless development can be shown to improve the livelihoods of people within the framework of the respect for human rights, it will not produce the desired results. This approach may be of particular importance for indigenous peoples whose human rights have frequently been neglected, when not actually impaired, by traditional economic development approaches.

84. There is much international debate on these issues, and it is useful to place the human rights concerns of indigenous people into this frame of reference. Particularly relevant to this topic is the report of the nineteenth session of the WGIP, held in July 2001 (E/CN.4/Sub.2/2001/17), which was devoted to a discussion of the right to development and its implications for indigenous people. A review of the numerous statements made by government delegates and representatives of indigenous peoples and NGOs at that session points to the serious concerns expressed about human rights issues in the process of development.[30] The Special Rapporteur intends to look more closely at a number of development projects in order to assess to what extent and how the human rights of the indigenous communities involved are being taken into account and respected in development strategies.

6. Political representation, autonomy, self-determination

85. Indigenous self-organization has made considerable progress over the years. From the local level to the regional, national and international levels indigenous peoples' associations have become social and political actors in their own right, as witnessed by their continuing participation in the yearly sessions of the WGIP. They speak with many voices, but on the fundamental issues of their human rights, their objectives and their aspirations they are usually in remarkable agreement. In some countries they are now recognized as legitimate partners and interlocutors of Governments and other social sectors on the national scene. In other countries

the going has been more difficult, their organizations may not be officially recognized and their human right to free association may not be completely respected. To the extent that the rights of indigenous peoples themselves are sometimes neglected and ignored within existing power structures, their organizations and other human rights advocacy associations that take up their cause may also become victims of abuses and be denied adequate protection under the law. Numerous communications to this effect have been addressed over the years to, amongst others, OHCHR, the ILO Committee of Experts and the Inter-American Commission of Human Rights.

86. Beyond respect for their human rights, indigenous organizations also claim the right to political representation qua indigenous peoples at the national level, an issue which may or may not be compatible with existing political structures. More insistent has been the demand for some kind of autonomy, and in a number of countries this has been achieved whereas in others it is not contemplated in current legal arrangements. A case in point is the Constitution of the Philippines which recognizes the right of Muslim and Cordillera peoples to self-determination in the form of autonomy, but the latter are still awaiting the creation of their autonomous region.[31]

87. One of the more controversial topics surrounding the human rights and fundamental freedoms of indigenous peoples concerns the much-debated right of peoples to self-determination. In their statements to international forums indigenous representatives demand the recognition of their right to self-determination as peoples. Equally insistently, some States argue that such a right should not extend to the indigenous. The concept of self-determination is closely linked to the use of the term "peoples". There does not appear to be a clear and unequivocal definition of this term in any of the multiple international legal instruments that have been adopted over the last half century nor, for that matter, in national legislation. Without a clear definition that may command a broad consensus, it is not obvious what the debate is really all about. In political science and legal literature the term is usually linked to all the citizens of an existing State, whereas in sociological texts the notion of a "people" refers to certain commonalities, shared identities and identifications.

88. The principle of the right of peoples to self-determination has been present in international debates for almost a century, and the current claims to this right by indigenous organizations is only the latest instance of its use in the expanding debate about human rights. Whereas some national constitutions do indeed refer to the right of self-determination of indigenous peoples (e.g. Mexico's constitutional reform in August 2001), other legislations avoid it, and the controversy relates to the meaning given to the term in both international and national law. Africa provides another example of conceptual difficulties. In 1981 the Organization of African Unity approved the African Charter on Human and Peoples' Rights, and yet nowhere is the term "peoples" defined. Specialists continue to debate whether the term should apply only to all citizens of a given State or whether it has other applications as well (such as indigenous peoples).

89. The Special Rapporteur recognizes that the use of the concept of self-determination has undergone changes over time, and as far as indigenous peoples are concerned, it has generated much controversy and has polarized positions in forums such as the World Conference on Human Rights in 1993 and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001, leading also to unfortunate delays in the adoption of the Draft United Nations declaration by the Commission on Human Rights.

90. The Vienna Declaration and Programme of Action does not spell out any specific rights of indigenous people, but declares: "Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization" (part I, para. 20).

91. At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance there were difficult discussions over this concept between indigenous representatives and government delegations, and the wording of the final declaration did not satisfy everyone (see Introduction). The Draft United Nations declaration on the rights of indigenous peoples adopted by the WGIP establishes in article 3 that "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[32] The Special Rapporteur believes that it would be useful to review current debates on this topic and suggest constructive ways to solve a conceptual issue that is of primordial importance to both States and indigenous peoples.

III. THE QUESTION OF DEFINITIONS

92. One of the more widely debated topics concerning the character and scope of the human rights of indigenous peoples as well as the specific areas in which their protection may be ensured by State action is the ambiguity surrounding the definition of the term "indigenous". There is no internationally agreed upon definition of indigenous peoples. Different States adopt different definitions in terms of their particular contexts and circumstances. The term indigenous is frequently used interchangeably with other terms, such as "aboriginal", "native", 'original", "first nations" or else "tribal" or other similar concepts. In some States local terms might commonly be used that are not easily translatable. In still other countries, no formal designation exists even though there might be general agreement that such populations do in fact inhabit certain areas of the country. And in still other countries, the existence of indigenous groups is denied altogether and therefore their definition becomes even more problematic. Yet the absence of an international definition should not prevent constructive action in the promotion and protection of the human rights of indigenous peoples.

93. In recent decades, formal definitions have become more common in national legislation concerning rights and issues of indigenous peoples, whereas in other cases such legislation exists without a formal definition. Above and beyond a legal or formal definition, another problem concerns the criteria for membership in an indigenous group, nation or community.

94. While indigenous peoples the world over share many commonalities, it is also necessary to recognize the different situations that prevail. In North America, for example, indigenous nations were considered as sovereign and distinct by the Governments of the United States and Canada well into the nineteenth century. Relations between these peoples and the State were based on treaty arrangements which, as time went by, were abrogated unilaterally by the States concerned, a process which has been labelled "retrogression" by Miguel Alfonso Martínez,

Special Rapporteur of the Sub-Commission, in his study on treaties.[33] In these countries, the human rights situation of indigenous peoples derives in great measure from these treaties and their consequences.

95. Of special interest is the situation in Africa. In his report to the Sub-Commission over a decade ago, Special Rapporteur Martínez Cobo wrote that he had "always considered that certain population groups in several African countries or regions should be considered as indigenous ..." but in his report he does not refer to African countries because it was difficult at that time to obtain information.[34]

96. At the Arusha Seminar on multiculturalism in Africa, participants "... recommended that African States recognize all indigenous and minority peoples. This should include recognition in the Constitution of the dignity and diversity of peoples within the State. Recognition of indigenous or minority identity was considered a first step in the protection of the rights of indigenous peoples and minorities".[35] At the same time, the participants noticed that some African States reject the notion of "indigenous people" because it might lead to an upsurge of "tribalism" and threaten the unity of the State. An earlier International Conference on Indigenous Peoples in East, Central and Southern Africa, also held in Arusha, in 1999, addressed the right to land, education, natural resources and the rights of indigenous women.[36] In October 2000, the African Commission on Human and Peoples' Rights, at its twenty-eighth session held in Banjul, adopted a resolution whereby it established an expert working group on the rights of indigenous or ethnic communities in Africa which is to examine the concept of indigenous peoples and communities in Africa, study the implications of the African Charter of Human and Peoples' Rights for the well-being of indigenous communities, and suggest appropriate recommendations regarding the protection of the rights of indigenous communities.[37] The working group takes the view that there are indigenous people in Africa, based on the principle of self-identification as expressed in Convention 169.[38]

97. The States of Asia also present different approaches. Some scholars consider the various "tribal" categories used in some countries as equivalent to the concept of indigenous peoples, whereas other observers deny this identification. When judged by their attendance at the annual meetings of the WGIP, it is clear that numerous tribal peoples identify themselves as indigenous and are so considered by other indigenous organizations. In contrast, no such definitional problems arise concerning indigenous peoples in Australia, New Zealand, Scandinavia or the Russian Federation where a long-standing legal tradition provides clear guidelines regarding the definition of groups and criteria for membership therein.

98. For instance, the Government of Japan in 1987 recognized the Ainu as a minority, and in its third periodic report to the United Nations Human Rights Committee in 1991 (CCPR/C/70/Add.1 and Corr.1 and 2), stated that the Ainu "may be called a minority". This has been interpreted as a policy of progressive "minorization" of the Ainu, to be dealt with within the framework of article 27 of the International Covenant on Civil and Political Rights. However, the Japanese Diet in May 1997 approved the Ainu Culture Law, which recognizes the Ainu as "an indigenous and small-numbered people". Also in 1997 the Sapporo District Court, in a

landmark case which some Ainu had filed against the Government in relation to the construction of a dam on their land, recognized the indigenous identity of the Ainu. Moreover, Ainu delegations have been present at the annual sessions of the WGIP, and demand recognition as an indigenous people.[39]

99. In its continuing activities surrounding indigenous issues the United Nations system is contributing to the clarification of the issue of definition of indigenous peoples. The Martínez Cobo report suggests one definition, which has been widely used and quoted.[40] Convention 169 has used some of its elements in defining the peoples to which it applies and adds, in article 1, paragraph 2: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."[41] The Draft United Nations declaration on the rights of indigenous peoples does not provide a definition, but states the right to membership in an indigenous community.[42] The WGIP in 1995 adopted four principles to be taken into account in any possible definition of indigenous peoples: (a) priority in time, with respect to the occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and (d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[43]

100. As regards individual membership, indigenous communities usually apply their own criteria, and whereas some States do regulate individual membership, it has become increasingly accepted that the right to decide who is or is not an indigenous person belongs to the indigenous people alone. Nevertheless, it must be recognized that membership in indigenous communities implies not only rights and obligations of the individual vis-à-vis his or her group, but may also have legal implications with regard to the State. In the design and application of policies regarding indigenous peoples, States must respect the right of self-definition and self-identification of indigenous people. The Special Rapporteur, drawing on a vast amount of expertise held by the indigenous peoples themselves, Governments and academic institutions, expects to continue to report on this debate at the international level.

IV. SPECIFIC CONCERNS RELATING TO THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE

101. At this early stage in his mandate, the Special Rapporteur cannot hope to provide a full picture of the human rights situation of indigenous peoples and communities around the world. But drawing on existing information, basically the communications and statements that have been addressed recently to the WGIP, CERD and other bodies, as well as communications and complaints that have come to the attention of the Special Rapporteur directly since he took up his mandate, it is possible to identify some of the principal current concerns of indigenous peoples, communities and organizations. Fuller treatment is provided in the addendum to this report.

102. A look at the pattern of many of these concerns reveals that the problem of a "protection gap" between existing human rights legislation and specific situations facing indigenous people is indeed of major significance and presents a challenge to international mechanisms for the effective protection of human rights. The Special Rapporteur has not yet had the opportunity to

investigate thoroughly any number of specific cases which have come to his attention and therefore withholds any conclusion regarding such particular communications. He is convinced, however, that given the patterns of situations referred to in the documentation to which he has had access, he would be doing a disservice to his mandate if he did not draw the attention of the Commission to these concerns and their implications for the full and effective protection of the human rights of indigenous people.

103. The issue of land rights is paramount in a number of cases that have come to the attention of the Special Rapporteur, as indicated in communications regarding the Chiquitano people in the lowlands of South America, several Indian tribes in the Amazon region, the Mapuche in southern South America, the Secwepemc on the North-West coast of North America, the Bushmen in southern Africa and the Orang Asli and other indigenous groups in South-East Asia. A disturbing element in a number of instances is the displacement or forced resettlement of indigenous communities as a result of major projects (such as hydroelectric power dams) undertaken by States with international financing in the name of national development. In East Africa, the Hadzabe hunter-gatherers and the Maasai pastoralists are facing a State policy of sedentarization which affects several of their economic, social and cultural rights; a similar situation concerns the Bagyeli in central Africa and the Twa in the Great Lakes Region.

104. The vulnerability of land rights is also a problem besetting the Small Peoples in the Arctic regions of Asia, an issue that has been taken up by CERD.[44] In these regions, indigenous children face discrimination and other severe problems. In 1999, the Committee on the Rights of the Child expressed its concern for the living conditions of indigenous peoples in the north of the Russian Federation and their access to health, educational and other social services. The Committee referred to the growing incidence of societal discrimination against children belonging to ethnic minorities, including indigenous peoples, and asked the Government to take all appropriate measures to improve the situation.[45] Notwithstanding the extensive rights of Sami people in the Scandinavian countries, Sami women and children still face discrimination. In 2001, the Committee on the Elimination of Discrimination against Women (CEDAW) expressed its concern about the discrimination existing against Sami women.[46]

105. Indigenous peoples in South-East Asia face loss of control over land and resources due to the non-recognition of customary land rights. In most South-East Asian States there are no legal rules granting indigenous peoples the right to their land and many indigenous peoples are threatened by logging, mining and other exploitative activities or due to infrastructure programmes (dams, roads) pursued by national Governments. In resolution 55/95 on the situation of human rights in Cambodia, the General Assembly, while welcoming the measures taken by the Government to eliminate illicit logging, noted that this activity had "seriously threatened full enjoyment of economic, social and cultural rights by many Cambodians, including indigenous people".[47]

106. The ILO handles representations made by indigenous peoples concerning alleged violations of Conventions Nos. 107 and 169. An ILO ad hoc tripartite committee recently found that, in view of the importance of collective ownership of land for certain indigenous and tribal peoples, decisions involving legislative or administrative measures that may affect the land ownership must be taken in consultation with them. When communally owned indigenous lands are divided and assigned to individuals or third parties, this often weakens the exercise of their

rights by the community or people, and they may end up losing most, if not all, of the land.[48] Consultation has also been dealt with within the context of a number of situations involving displacement for the purposes of development projects, particularly in a number of Latin American countries as well as in Asia. In each instance, one of the primary concerns of both the tripartite committee and the Committee of Experts of the ILO has been the apparent lack or inadequacy of consultations with the indigenous peoples affected by these projects, and lack of protection of displaced persons. The Committee expressed concern that the burden of such projects should not fall disproportionately on the tribal people inhabiting regions where these projects take place. Measures should be taken to ensure that they are provided with adequate protection.

107. Ambiguities in the legal situation of indigenous peoples and communities are of particular concern to indigenous peoples in several Latin American countries, such as Argentina and Mexico.[49] The Amazigh people, who inhabit several countries of North Africa, demand legal recognition and the respect of their cultural and social rights as an indigenous people. In the Philippines, the Indigenous Peoples' Rights Act apparently stands in contradiction to other legislation that is also considered important by national authorities. Within the framework of constitutional review, the Ogiek, a hunter-gatherer people of Kenya, are claiming recognition as a distinct indigenous minority. The Maasai pastoralists are considered to be an indigenous minority in several East African countries, and their legal recognition varies in the different States. The Orang Asli of Malaysia are covered by special legislation in which the State retains the power of decision over certain rights of the people concerned. CERD has expressed its concern about the legal status of the indigenous peoples of Cambodia, particularly as regards their rights, culture and traditional lands.[50] Women and children are particularly affected by the lack of citizenship documents, because they become more vulnerable to exploitation. Indigenous women suffer terribly from the violence that occurs in many indigenous lands. It has repeatedly been documented that humiliation of and violence against women are used as a tool to terrorize indigenous communities in several South-East Asian countries.[51] In 1999, CEDAW expressed concern about hill-tribe women and girls in Thailand "whose rights may not be effectively protected by national law",[52] a concern also voiced by the Committee on the Rights of the Child.[53] Child prostitutes from hill-tribe communities are especially vulnerable to exploitation in this region.[54] (On the cases mentioned in this paragraph, see the addendum.)

108. In some countries, indigenous peoples have been the victims of civil conflicts, involving guerrilla warfare, paramilitaries, military repression and other forms of direct and indirect violence which has led to assassinations, forced disappearances, compulsory relocation, refugee flows, detention without due process, destruction of villages and entire communities, etc. The human rights situation of indigenous people in the framework of civil conflicts past or present has been extensively documented, but the actual protection of their human rights involves complex and difficult issues. In some countries, "truth commissions" were set up to elucidate the facts, in others special efforts at post-conflict reconstruction and reconciliation are being undertaken. The Maya and Miskito of Central America, the Hmong in South-East Asia, the East Timorese, the Emberá and Huaorani in South America, the Twa in East Africa have all, at one time or another, been hapless victims of civil or international violence and conflict, and their human rights situation must perforce fall under the United Nations human rights mandate. (See the addendum for a more detailed summary of the topics discussed in the previous paragraphs.)

109. As the cases referred to in the preceding paragraphs show, there are recurring patterns in the alleged violations of the human rights of indigenous peoples everywhere. Land dispossession, discrimination and violence against indigenous individuals and communities, relocation and insufficient delivery of social services (health and education, among others) are recurring themes in communications and statements issued by indigenous representatives in international forums. Among situations denounced by indigenous representatives as well as concerned NGOs we may mention mining and logging activities affecting indigenous livelihoods, flooding of indigenous ancestral territories due to multipurpose projects, environmental destruction because of the building of oil pipelines, and violence against indigenous leaders who fight for the rights of their communities. Discrimination against indigenous peoples is often reflected in insufficient funds or investments for economic growth, lack of resources for social and cultural services, and national priorities which lie elsewhere than in the area of indigenous development. Discrimination against indigenous and tribal peoples, including women, in the area of labour, including forced labour in the form of debt bondage, and inhuman working conditions affecting a large number of "scheduled tribe" workers has been noted by the ILO Committee of Experts.

110. Communications and complaints about violations of the human rights of indigenous people are plentiful and they occur under the most diverse circumstances. Over the years, the representatives of indigenous peoples present at the sessions of the WGIP have provided extensive documentation in this respect. Alleged violations are also presented to other international bodies, such as the ILO Committee of Experts (regarding Conventions Nos. 107 and 169), CERD, the Human Rights Committee and CEDAW, as well as regional bodies such as the Inter-American Commission on Human Rights. Besides such formal communications, numerous non-governmental organizations and human rights advocacy groups gather information, monitor conditions, verify and document specific complaints and claims and disseminate the results through worldwide networks of concerned citizens. When such complaints are verified by independent sources and backed up by reputable institutions (such as recognized human rights organizations or academic research centres), then it is probable that their substance deserves serious consideration by the Special Rapporteur and the Commission on Human Rights.

111. In some instances, the subject matter of a communication on an alleged violation of human rights may fall under the mandate of other special rapporteurs as well, and it will be useful to develop mechanisms of cooperation and coordination with them (as resolution 2001/57 indicates) in order to deal with these cases constructively and efficiently. While numerous communications refer to the violation of the human rights of particular indigenous persons, a constant thread in these documents refers in fact to the situation of communities, specific groups or entire peoples, and they may involve one or several of the human rights established in the International Covenants on Human Rights. In some instances, indeed, such conditions may involve massive and gross violations of human rights, of which indigenous people are the victims for no other reason than that they are indigenous.

112. In order to process adequately the information that comes to his attention, the Special Rapporteur will follow the guidelines and procedures that have been set out in the United Nations human rights protection mechanisms. He especially wishes to call upon Governments to provide him with their full cooperation in seeking elucidation and clarification concerning alleged human rights violations, whether of an individual or collective nature.

V. FUTURE ACTIVITIES OF THE SPECIAL RAPPORTEUR

113. Taking into consideration the major human rights issues set out above, the Special Rapporteur, within the mandate which the Commission of Human Rights has set out, will identify particular topics that deserve special attention, after consultations with indigenous organizations, Governments, experts of the WGIP and other specialists. Such topics might include:

(a) The impact of development projects on the human rights and fundamental freedoms of indigenous communities;

(b) Evaluation of the implementation of recent legislation at the national level related to the rights of indigenous peoples;

(c) Human rights issues for indigenous people in the realm of administration of justice, including, where relevant, the relationship between positive and customary (non-written) legal systems;

(d) Cultural rights of indigenous peoples as reflected in bilingual and intercultural education, as well as the preservation and development of their own cultural heritage;

(e) Human rights issues - particularly economic and social rights - regarding indigenous children, especially girls, in different settings, such as migrations, trafficking of women and girls, violent conflicts, the informal economy, etc.;

(f) Participation of indigenous peoples in decision-making processes, autonomic arrangements, governance and policy-making, with special regard to the full implementation of civil and political rights;

(g) Old and new forms of discrimination against indigenous people, within a gender perspective, in the light of the Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as measures and remedies undertaken to combat discrimination and implement the human rights and fundamental freedoms of indigenous peoples.

114. An outline for each topical study will be prepared after a preliminary examination of the subject based on existing documentation. The study will then be developed using a variety of inputs and sources, such as published material and reports prepared by Governments, public institutions, non-governmental organizations, academic institutions and investigative journalists.

Inputs prepared by indigenous peoples' associations and institutions will be greatly valued. In particular, it would be extremely helpful if each individual topic could be addressed by means of the organization of an international high-level seminar, the conclusions of which would provide a crucial input for the studies and the Special Rapporteur's future reports.

115. The Special Rapporteur intends to prepare and circulate focused questionnaires and schedules on these special topics, in the hope of obtaining up-to-date reliable information from a variety of sources, mainly Governments and indigenous organizations. Considering the generous offers made to him during his initial conversations, the Special Rapporteur hopes to be able to count on the cooperation of numerous institutions and individuals from many countries in the preparation of these topical studies.

116. A crucial element for the success of the Special Rapporteur's mandate will be in loco visits. To the extent that time and resources are limited, such visits will have to be prepared carefully for maximum results. OHCHR will assist and advise the Special Rapporteur in preparing and organizing visits to a number of countries, at the invitation of interested Governments and the request of indigenous organizations. During the year 2002, the Special Rapporteur hopes to visit, in his official capacity, one or more countries in at least three different regions.

117. The mandate of the Special Rapporteur will be unfulfilled unless he is able to establish fluid communications with indigenous organizations and receive communications from individuals and institutions regarding their human rights and fundamental freedoms. He has already initiated contacts to that effect and hopes that during 2002 such communications will develop satisfactorily. Here again, the support of the OHCHR will be crucial in processing communications and complaints that may reach the Special Rapporteur.

118. If the topics mentioned above are retained, the Special Rapporteur intends to concentrate on making progress especially on one topic a year, without disregarding entirely the other areas. With the assistance of the UNHCHR and other institutions, he hopes to develop a computerized database of communications received alleging human rights violations of indigenous people. The database will eventually also include reports from different sources on the human rights situation of indigenous people. Based on the communications and studies undertaken, the Special Rapporteur will formulate in his second report a set of recommendations and proposals on appropriate measures and activities to be undertaken, as expected by the Commission.

119. The Special Rapporteur wishes to acknowledge the trust he has received from the Commission and wishes to thank the OHCHR and its staff for their assistance, as well as the short-term consultants Maureen Tong and Alexandra Xanthaki. He also wishes to acknowledge the institutional support received from El Colegio de México to carry out his duties, and expresses his thanks in particular to Elia Aguilar and Gabriel Baeza. Many people have provided valuable information and suggestions, among them Warren Allmand, Paul Chartrand, Bartolomé Clavero, Jorge Dandler, Roxanne Dunbar Ortiz, Magdalena Gomez, Diego Iturralde and Lee Swepston. He particularly wishes to express his thanks to the many indigenous organizations and human rights associations that provided him with invaluable information.

Notes

[1] Convention No. 107 is still adhered to by 20 States.

[2] Report III (1A), International Labour Conference, 87th Session, Geneva, 1999.

[3] In its resolution 1995/32, the Commission established an open-ended intersessional working group with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to Sub-Commission resolution 1994/45, entitled "Draft United Nations declaration on the rights of indigenous peoples".

[4] Under the Treaty of Waitangi Act of 1975, Maori claims are dealt with by the Waitangi Tribunal in New Zealand.

[5] See S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, 1996.

[6] Cf. Cletus Gregor Barié, *Pueblos indígenas y derechos constitucionales en América Latina: un panorama*, México, Instituto Indigenista Interamericano, 2000; Bartolomé Clavero, *Derecho indígena y cultura constitucional en América*, México, Siglo XXI, 1994; Comisión Nacional de Derechos Humanos, *Derechos de los pueblos indígenas. Legislación en América Latina*, México, CNDH, 1999.

[7] Norway was the first country to ratify ILO Convention No. 169.

[8] International Labour Office, *Indigenous Peoples. Living and Working Conditions of Aboriginal Populations in Independent Countries*, Geneva, International Labour Office, 1953, p. 89.

[9] José R. Martínez Cobo, Study of the problem of discrimination against indigenous populations (E/CN.4/Sub.4/1986/7 and Add.1-4. Addendum 4, containing the conclusions, proposals and recommendations of the Special Rapporteur, was issued as a United Nations Publication, Sales No. E.86.XIV.3.

[10] *Indigenous People and Poverty in Latin America. An Empirical Analysis,* George Psacharopoulos and Harry Anthony Patrinos (eds.). Washington, DC, The World Bank, 1994, pp. 206-207.

[11] E/CN.4/Sub.4/1986/7/Add.4, para. 194.

[12] Erica-Irene A. Daes, Indigenous peoples and their relationship to land (E/CN.4/Sub.2/2001/21), para. 13.

[13] Ibid., para. 38.

[14] Ibid, paras. 123 and 130.

[15] José Aylwin O., *El acceso de los indígenas a la tierra en los ordenamientos jurídicos de América Latina. Un estudio de casos.* Santiago, ECLAC, March 2001 (manuscript).

[16] Colin Nicholas, "Orang Asli and human rights", Subang Jaya, Malaysia, Center for Orang Asli Concerns, 2001. The indigenous peoples of Sabah and Sarawak are covered by separate legislation, and their situation is somewhat different from that of the Orang Asli, but they face many of the same problems.

[17] *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. The Republic of Nicaragua*, Judgement Summary and Order of the Inter-American Court of Human Rights, issued 31 August 2001.

[18] Daes, op. cit., para. 38.

[19] See the report of the Expert Seminar on Practical Experience Regarding Indigenous Land Rights and Claims held in Whitehorse, Canada, in 1996 (E/CN.4/Sub.2/AC.4/1996/6).

[20] This section deals with rural indigenous people only. Urban indigenous people have different problems, which will be dealt with in another context.

[21] Human Rights Committee, general comment No. 23 on article 27 of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.5) adopted at its 1314th meeting (fiftieth session), 6 April 1994.

[22] The Nunavut web site is *www.nunavut.com.*

[23] Congresos y organizaciones indígenas de Panamá, *Informe de la Situación de los Derechos Humanos de los Pueblos Indígenas de Panamá*, Panama, report presented to the Inter-American Commission of Human Rights, 6 June 2001.

[24] Article 15, paragraph 1, of ILO Convention No. 169 reads as follows: "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." Article 18 of the Draft United Nations declaration on the rights of indigenous peoples states: "Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources." Article 30 states: "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources."

[25] Article 18, paragraph 4 reads: "Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence."

[26] Ethnocide is a process of cultural change and destruction as a result of specific policies that undermine a cultural community's ability for self-preservation.

[27] African Commission on Human and Peoples' Rights, "General guidelines regarding the form and contents of reports to be submitted by States members regarding the meaning, scope and weight of the 'rights of peoples' recognized by articles 17 (2), 19 to 20 of the Charter", 1990, pp. 417-418.

[28] Barney Pityana, The African Commission on Human and Peoples' Rights and the Issue of Indigenous Peoples, *Indigenous Affairs*, International Work Group on Indigenous Affairs (IWGIA), No. 2/1999, p. 49.

[29] Statement of the Committee on Indigenous Health (COIH) to the WGIP, July 2001.

[30] See E/CN.4/Sub.2/2001/17. The twentieth session of the WGIP will be devoted to further discussion of this topic.

[31] David A. Daoas, "The rights of the cultural communities in the Philippines", "... *Vines that won't Bind ...*", *Proceedings of a Conference held in Chiang Mai, Thailand, 1995*, IWGIA Document 80, 97-107, 102-103.

[32] Regarding the legal status of the Draft United Nations declaration, Professor Paul Chartrand considers that it "can be viewed as a restatement of the law, and not new law as such. For example, articles 1 to 3 clearly reiterate the existing international covenants, and clarify their applicability without discrimination to indigenous peoples" (personal communication, 28 November 2001).

[33] Miguel Alfonso Martínez, Special Rapporteur of the Sub-Commission, Study on treaties, agreements and other constructive arrangements between States and indigenous populations (E/CN.4/Sub.2/1999/20). Other States also signed treaties with aboriginal nations, notably Chile and New Zealand.

[34] E/CN.4/Sub.2/1986/7/Add.4, para. 20.

[35] Report on the Seminar on "Multiculturalism in Africa: peaceful and constructive group accommodation in situations involving minorities and indigenous peoples" (Arusha, 13-15 May 2000) (E/CN.4/Sub.2/AC.5/2000/WP.3, para. 31).

[36] Jensen and Dahl, Editorial in *Indigenous Affairs*, IWGIA, No. 2/1999, p. 2.

[37] Fifteenth annual activity report of the African Commission, Banjul, the Gambia, October 2001.

[38] The regional strategy of the Project to Promote ILO Policy on Indigenous and Tribal Peoples identified seven African countries in which it will operate. They are Cameroon, the Central African Republic, Ethiopia, Kenya, Morocco, South Africa and the United Republic of Tanzania.

[39] Takemasa Teshima, "ICCPR Article 27 and the Ainu People", 1998. In NGO Counter-report, "Discrimination in Japan from the Perspective of the International Covenant on Civil and Political Rights, Tokyo, Buraku Liberation and Human Rights Research Institute, 1998, pp. 74-83. See also, Ainu Association of RERA, communication submitted to the United Nations WGIP in July 2001.

[40] "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." (E/CN.4/Sub.2/1986/7/Add.4, para. 379).

[41] Convention 169 applies to: "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

[42] "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned." (art. 9) and "Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions" (art. 32).

[43] See E/CN.4/Sub.2/AC.4/1996/2. A similar approach is followed by the Indigenous Peoples of Africa Coordinating Committee (IPACC). See IPACC, *Annual Report (November 1998 to October 1999)*, appendix, p. 22.

[44] CERD/C/SR.1246 of 5 March 1998; see also interventions by Russian NGOs at the WGIP in July 2001.

[45] CRC/C/15/Add.110 of 10 November 1999, para. 65.

[46] A/56/38, paras. 319-360 of 31 July 2001, para. 356.

[47] See General Assembly resolution 55/95 of 28 February 2001; see also Commission resolution 2000/79 of 27 April 2000.

[48] Report adopted by the Governing Body at its 271st Session regarding the representation made by the General Confederation of Workers of Peru alleging non-observance of Convention No. 169 by Peru. See also the report adopted by the Governing Body at its 271st Session regarding the representation made by the Central Obrera Boliviana, alleging non-observance of Convention No.169 by Bolivia.

[49] Communications addressed directly to the Special Rapporteur between July and October 2001 (see addendum).

[50] See CERD/C/304/Add.54.

[51] See Debbie Stothard, "Atrocities against indigenous women in Burma", IWGIA, *Indigenous Affairs*, No. 3/2000, pp. 28-33.

[52] A/54/38, para. 239.

[53] CRC/C/15/Add.97.

[54] Charyan Vaddhanuphuti, "The present situation of indigenous peoples in Thailand", *"... Vines that won't Bind ...", Proceedings of a Conference held in Chiang Mai, Thailand, 1995*, op. cit., pp. 79-88.